

No. 11383

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CHARLES STROM and FLORA STROM,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

FILED

SEP 4 - 1940

PAUL P. O'BRIEN,  
CLERK







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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

L. L. THOMPSON, Esq.,

L. B. DONLEY, Esq.

For Commissioner:

W. H. PAYNE, Esq. [1\*]

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Docket No. 1798

CHARLES STROM and FLORA STROM,

Husband and Wife,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transferred to Judge Leach 1/23/46

## DOCKET ENTRIES

1943

May 24—Petition received and filed. Taxpayer notified. Fee paid.

May 24—Copy of petition served on General Counsel.

May 24—Request for Circuit hearing in Seattle, Wash., filed by taxpayer. 5/25/43 granted.

July 2—Answer filed by General Counsel.

July 6—Copy of answer served on taxpayer, Seattle, Wash.

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\* Page numbering appearing at top of page of original certified Transcript of Record.

1944

Aug. 31—Hearing set Oct. 30, 1944, at Seattle, Wash.

Oct. 30—Hearing had before Judge Mellott on merits. Stipulation of facts filed. Briefs due 45 days. Replies due 20 days.

Dec. 8—Brief filed by taxpayer. 12/14/44 Copy served.

Dec. 13—Brief filed by General Counsel. Served 12/14/44.

1945

Jan. 17—Transcript of hearing Oct. 30, 1944 filed.

1946

Mar. 29—Findings of fact and opinion rendered, Judge Leech. Decision will be entered for the respondent. Served 4/1/46.

Mar. 29—Decision entered, Judge Leech, Div. 6.

June 17—Stipulation as to venue filed.

June 17—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

June 17—Proof of service filed by taxpayer.

June 17—Praecipe for record filed by taxpayer with proof of service thereon.

June 17—Agreed statement of evidence filed.

The Tax Court of the United States

Docket No. 1798

CHARLES STROM and FLORA STROM,  
Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:90D:GLB, dated March 9, 1943, and as a basis of their proceeding allege as follows:

1. The petitioners, during all of the times mentioned herein, were and are husband and wife and during all of said times were residents of the town of Taholah, in the state of Washington, which town is situated within the boundaries of the Quinaielt Indian Reservation. No return was filed by petitioners for the period here involved with the Collector for the District of Washington for the reason that the petitioners contend that, under the appropriate tax laws of the United States, they were not required to file an income tax return or pay any tax upon the income here in controversy.

2. The Notice of Deficiency (a copy of which is attached and marked "Exhibit A"), was mailed to the petitioners on March 9, 1943.

3. The taxes in controversy are income taxes for the calendar [2] year 1941 and in the amount of \$169.67.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The refusal of the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, at Seattle, Washington, to hold that the income of petitioners, referred to in said Notice of Deficiency, is exempt from the imposition of income taxes by the United States under the statutes of the United States, the Constitution of the United States and the provisions of the Indian Treaty of July 1, 1855, between the Quinaielt Tribe and other Indian tribes and the United States (12 St. L. 971), which treaty was ratified by the United States on March 8, 1859.

(b) The refusal of the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge at Seattle, as aforesaid, to hold that, in any event, the Government of the United States and the Commissioner of Internal Revenue are not estopped from seeking to collect from petitioners an income tax upon their 1941 net income by reason of the facts and circumstances hereafter alleged.

(c) The refusal of the Commissioner of Internal Revenue, acting through said Internal Revenue Agent in Charge at Seattle, to hold that, in any event, the Government of the United States and the Commissioner are not [3] bound by long and con-

tinuous executive construction and interpretation to construe and interpret the general income tax laws applicable to the taxation of the net income of the citizens of the United States for the calendar year 1941 as not intended to include as subject to the imposition of said income tax, the income here involved.

(d) In imposing upon petitioners a penalty of \$42.42 on account of their failure to file an income tax return for said calendar year.

5. The facts upon which petitioners rely as a basis for this proceeding are:

(a) Petitioners, during their entire lives were, and now are, members of the Quinaielt tribe and during all of the said times resided within the boundaries of the Quinaielt Indian Reservation on the northwestern shores of the State of Washington, which Indian Reservation was created under said treaty of July 1, 1855, heretofore referred to, and are direct descendants of the members of said Quinaielt tribe, the representatives of which entered into said treaty with the United States. Petitioners at all times mentioned herein were, and now are, wards of the Government of the United States under applicable provisions of the statutes of the United States relating to Indian peoples who have remained under the jurisdiction of the Office of Indian Affairs of the Department of the Interior of the [4] United States. The entire net income of petitioners, referred to in said Notice of Deficiency, and amounting to \$3,316.70, was income which accrued to peti-

tioners from the sale by petitioners of food fish caught by the petitioner, Charles Strom, in the waters of the Quinaielt River, which river flows through said Quinaielt Indian Reservation and is within the boundaries thereof. Previous to the making of said treaty the ancestors of petitioners, who constitute the Quinaielt Indian tribe, were the owners as a sovereign entity, of a considerable area of timber lands bordering upon the Pacific Ocean and situated generally in the northwestern portion of the State of Washington and which area included the lands now located within the boundaries of the Quinaielt Indian Reservation. Said areas were not then, and are not now, suitable or adapted to agriculture and from time immemorial petitioners' ancestors and the petitioners have depended to a very substantial extent for their subsistence upon the taking of food fish from the waters of said area, particularly from the waters of the Quinaielt River which, from time immemorial, has been known as a river frequented at intervals by salmon of the finest species. Pursuant to the terms of said treaty, the then President of the United States, by executive order dated November 7, 1873, set aside for the perpetual use of the members of the Quinaielt tribe, the area now included in the Quinaielt Indian Reservation, through which [5] area flows the Quinaielt River and from the waters of which the petitioner, Charles Strom, caught the fish which produced the income now sought to be taxed by the respondent. Said fishing waters have never been allocated by the Government of the United States to the specific use of any par-

ticular members of the Quinaielt tribe but, pursuant to proper rules and regulations of the Office of Indian Affairs of the Department of the Interior of the United States, the tribal council of the Quinaielt tribe has been permitted to, and has, allocated certain fishing locations upon said Quinaielt River to the various members of the tribe, at which allocations fish is caught by the use of nets and other fixed appliances by the members of the tribe. Title to said fishing allocations has, however, been regarded both by the Government and by the tribe as vested in the tribe as an entity, subject to such allocations as might be made by the tribal council of the tribe and approved by the Indian Agent in Charge. The fish heretofore referred to, and from the sale of which petitioners' 1941 net income referred to in the Notice of Deficiency was received, was caught by the petitioner, Charles Strom, at a place assigned to his use by said tribal action. The purpose and intent of said treaty and the creation of said Indian Reservation thereunder was to allocate to the members of the Quinaielt tribe all fishing rights in said Reservation, to the end that the members of said tribe might not [6] become objects of public charity and to make them self-supporting. That, in fact and in law, said fish were and are capital assets of the members of said Indian tribe set aside to them by the joint action of the United States and the representatives of the tribe for their perpetual use and support.

Since the creation of said Indian Reservation the taking of fish for commercial purposes within the

boundaries of said reservation by persons other than the members of the Quinaielt tribe has at all times been prohibited by the Government of the United States. The taking of fish for personal consumption by other than the members of the tribe has been permitted by the Government to a limited degree but pursuant to the rules and regulations promulgated by said Office of Indian Affairs. The Government of the United States at all times has insisted that it has full power to either regulate or prohibit the taking of fish within the boundaries of said reservation by such persons, anything in the laws of the State of Washington to the contrary notwithstanding.

That by reason of the facts and circumstances herein set forth, petitioners assert that the Act of Congress did not require the payment of income taxes upon moneys received by petitioners from the sale of fish caught in the waters and under the circumstances [7] aforesaid and that if said statutes be construed as seeking to impose such tax then they are in violation of the Constitution of the United States.

(b) In the alternative, and in the event that the court should hold that said income is subject to the imposition of income taxes, then petitioners allege that the respondent is now estopped from collecting from the petitioners income taxes imposed upon income for 1941 or prior years. This contention is based upon the following facts: For a period of many years previous to the year 1942 the Commissioner of Internal Revenue of the United States and



his predecessors in office, in many official and non-official opinions to which respondent has access, has ruled that income of this nature was not subject to the imposition of income taxes under the laws of the United States. This ruling, for many years, was communicated to the various Indian agents appointed by the Office of Indian Affairs to supervise the affairs of the Indian tribes, including the Quinaielt tribe, and to advise with them concerning their relations with the Government of the United States. That previous to the year 1942 and the imposition of the tax here in question, neither petitioners or the other members of the Quinaielt tribe were ever advised that the Commissioner of Internal Revenue had reversed his position or that the members [8] of said tribe would be required to file income tax returns and pay taxes under the income tax laws; that, acting and relying upon said uniform construction of the tax laws by the Commissioner of Internal Revenue, petitioners and the other members of the tribe made no provisions for the payment of any taxes upon income received in 1941 and prior years; that the year 1942 was a poor fishing year and the members of the tribe, including petitioners, received a very reduced income from fishing operations and that they have insufficient funds available for the payment of said taxes and that if compelled to pay them they will have to be supported by the Government of the United States; that the Government of the United States, by reason of the acts and conduct of the Commissioner of Internal Revenue, as aforesaid, should now be held to be estopped from seek-

ing to collect taxes upon income of this nature received by petitioners in 1941 and prior years.

(c) In the alternative, and in the event that the court should refuse to hold with petitioners upon the contentions made in the preceding paragraphs of this petition, then it is contended that, in any event, the respondent, both in equity and in law, had no right to impose upon petitioners a penalty of \$42.42 for failing to file a return for the year 1941. The facts and circumstances upon which petitioners rely in support of this contention are set forth in the preceding sub-paragraph [9] of this petition, which is made a part hereof by reference.

Wherefore, petitioners pray that this court may hear this proceeding and on such hearing may determine that there is no tax due from petitioners for the year 1941, and in the alternative and in any event, that there is no penalty due from petitioners for failing to file a tax return for said year, and for such other and further relief as to the court may seem just and equitable.

L. L. THOMPSON,

L. B. DONLEY,

Counsel for Petitioners.

State of Washington,  
County of Grays Harbor—ss.

Charles Strom and Flora Strom, each being first duly sworn on oath, say: That they are the petitioners above named; that they have read the foregoing petition and are familiar with the statements

contained therein and that the statements contained therein are true.

CHARLES STROM,  
FLORA STROM.

Subscribed and sworn to before me this 10th day of May, 1943.

[Seal] FRANK W. LAW,  
Notary Public in and for the State of Washington,  
residing at Taholah, Wn. [10]

EXHIBIT A

Treasury Department  
Internal Revenue Service

Seattle, Washington, March 9, 1943

Office of Internal Revenue Agent in Charges, Seattle  
Division, 350 Federal Office Building.

IT:90D:GLB

Mr. Charles Strom and Mrs. Flora Strom, Husband  
and Wife, Taholah, Washington.

Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1941, discloses a deficiency of \$169.67 and \$42.42 in penalty as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal

holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle, Washington, for the attention of IT:90D:GLB. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing this form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By /s/ S. R. STOCKTON,  
Internal Revenue Agent in  
Charge.

Enclosures: Statement; Form of waiver. GLB:sm

### STATEMENT

IT:90D:GLB

Mr. Charles Strom and Mrs. Flora Strom, Husband  
and Wife, Taholah, Washington.

Tax Liability for the Taxable Year ended December 31, 1941:

	Liability	Assessed	Deficiency	Penalty
Income tax	\$169.67	\$ None	\$169.67	\$ 42.42

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated September 8, 1942, and revised statement dated February 19, 1943; to your protest dated October 28, 1942; and to the statements made at the conferences held on November 13, 1942, and February 15, 1943.

Inasmuch as you failed to file a return within the time prescribed by law, 25 per centum of the tax has been added thereto in accordance with section 3612(d)(1) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, L. B. Donley, Finch Building, Aberdeen, Washington, in accordance with the authority contained in the power of attorney executed by you.

### Net Income

It has been determined that you received taxable net income during the year 1941 in the amount of \$3,316.70.

The computation of taxable net income is as follows:

Gross income from sales of salmon.....	\$5,917.29	
Less: Wages, spring run of salmon.....	\$1,754.52	
Wages, fall run of salmon.....	326.87	
Expenses .....	369.20	
Truck expense .....	150.00	2,600.59
		<hr/>
Net income.....	\$3,316.70	

## Computation of Tax

Net income adjusted .....	\$3,316.70
Less: Personal exemption .....	1,500.00
<hr/>	
Balance (surtax net income).....	\$1,816.70
Less: Earned income credit—10% of \$3,000.00.....	300.00
<hr/>	
Net income subject to normal tax.....	\$1,516.70
Normal tax at 4% on \$1,516.70.....	\$ 60.67
Surtax on                      1,816.70.....	109.00
<hr/>	
Corrected income tax liability.....	\$ 169.67
Income tax assessed:	
Original, Account No.—(no return filed).....	none
Deficiency of income tax .....	\$ 169.67

[Endorsed]: T.C.U.S. Filed May 24, 1943. [13]

[Title of Tax Court and Cause.]

## ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits that the petitioners are husband and wife, residing in the town Taholah, in the State of Washington. Admits that no return was filed by petitioners, for the period here involved, with the Collector of Internal Revenue for the District of Washington. Denies the remaining allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are in-

come taxes for the calendar year 1941. Respondent alleges that in addition to the deficiency in income tax asserted for the said year 1941, he also determined a deficiency in penalty for that year in the amount of \$42.42, as is shown by the deficiency notice, a copy of which is attached to the petition. [14]

4 (a) to (d), inclusive. Denies that in determining the deficiencies in tax and penalty as set forth in the deficiency notice, the respondent committed any of the errors alleged in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5 (a) to (c), inclusive. Denies each and every material allegation contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition herein, not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of deficiencies be approved.

/s/ J. P. WENCHEL, WHP

Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel,

B. H. NEBLETT,

WILFORD H. PAYNE,

Special Attorneys, Bureau of  
Internal Revenue.

[Endorsed]: T.C.U.S. Filed July 2, 1943. [15]

[Title of Tax Court and Cause.]

### AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following facts are true and may be considered by the court as evidence in this proceeding:

1. Petitioners, Charles Strom and Flora Strom, during the taxable year 1941, were and for many years last past have been husband and wife residing together as such in the town or Indian village of Taholah, Grays Harbor County, State of Washington, which town is situated wholly within boundaries of the Quinaielt Indian Reservation. The Quinaielt Indian Reservation is an Indian reservation located, lying and being wholly within Grays Harbor and Jefferson Counties, Washington. The boundaries thereof are correctly shown in the attached map of the Olympic Peninsula of the State of Washington which said map is marked as Joint Exhibit 1-A [16] and made a part hereof. No Federal tax returns have been filed by petitioners for the taxable year 1941.

2. The petitioner Charles Strom is an Indian of full blood of the age of fifty-four (54) years, and was born at LaPush, Washington. He is a member of the Quinaielt Indian tribe and has resided on the Quinaielt Indian Reservation at Taholah, Washington, for a total of about forty-four (44) years. Petitioner Flora Strom is  $\frac{1}{4}$  degree Quinaielt Indian.



3. The Quinaielt Indian Reservation has as its Westerly boundary the Pacific Ocean. The Quinault River flows from Lake Quinault on the Easterly end of said reservation in a Westerly direction, emptying into the Pacific Ocean at the said village or town of Taholah, Washington. During the spring and fall seasons there are runs of fish up the said river and to the said lake. From time immemorial the Quinaielt Indians and allied tribes have taken fish from the said Quinault River for their own use and, in later years, for sale.

4. For many years prior to 1911 pursuant to the Tribal customs and practices of the Quinaielt Indian tribe certain Indians were allotted by the Tribal leaders, the exclusive right of taking fish from certain areas on the Quinault River and in the lower or Western fifteen (15) miles thereof. About the year 1911, or subsequently, the Department of Interior of the United States of America, acting [17] by and through the United States Indian Service, began allocating to certain Indians, in accordance with said Tribal custom and usage, certain exclusive locations for the taking of fish from the said river. On April 9, 1919, E. B. Meritt, Assistant Commissioner of the Office of Indian Affairs of the United States of America promulgated certain regulations for governing fishing on the Quinault River. A full, true and correct copy of said regulation is hereto attached and marked as Joint Exhibit 2-B and made a part hereof.

5. Since the date of the decision of the United

States District Court for the Western District of Washington, Southern Division, rendered in the year 1925 in the case of *Mason v. Sams*, reported at 5 Fed. (2d) 255, the Indians on the Quinaielt Reservation have established their own regulations governing fishing operations in the various streams and lakes thereon, which practices have since been conducted without any Federal, State or administrative interference or supervision outside the tribe. Thereafter the sole control and government of fishing rights and practices on the Reservation has been under the direction of the Quinaielt Indian tribe acting by and through its Tribal Council.

6. The Quinaielt Indian Tribal Council thereafter adopted the aforesaid regulations, Joint Exhibit No. 2-B, in their entirety save and except from time to time the same have been amended in matters relative to the fishing seasons and the gear to be used. In all [18] other material respects said regulations have been and are enforced by the Quinaielt Indian tribe acting by and through its Tribal Council with the aid of what is known as the Channel Police of said tribe.

7. Pursuant to said rules, regulations, Tribal customs, usages, orders and regulations adopted by the said Tribal Council, certain but not all of the chartered fishing locations on the Quinault River have been, during the year 1941, and now are allotted and assigned for the use of certain individual members of the said tribe. There is attached hereto marked as Joint Exhibit 3-C and made a part hereof a blueprint made in 1932 showing the locations of seventy-

eight (78) of such fishing locations, as they existed in 1916. For many years last past, and during the year 1941, Charles Strom and his wife have been recognized as having the exclusive right to use and to take fish during proper seasons and with proper gear from location No. 7 as shown on the said blueprint. Said fishing location No. 7 at all times since the creation of said reservation has remained as common Tribal property not allocated, and is subject only to the rights of use granted by the Tribal Council to the said Charles Strom and wife.

8. Said fishing locations are on both sides of the Quinault River and each is 255 feet in length. There are similar fishing locations within said reservation on the Queets River (see Joint [19] Exhibit No. 1-A) which said fishing locations are also governed by the similar Tribal regulations. The size of locations, gear usable, and fishing seasons on the Queets River, however, differ from those pertaining to the Quinault River.

9. The matter of allocation of these several fishing locations were, in the beginning, based upon Tribal members taking over certain grounds which were recognized as being exclusive locations of such Tribal members. Under Tribal rules, regulations, and customs, and the orders of the Tribal Council, such fishing locations may be assigned to other persons or may pass, upon death of a holder of such a location, to his family, with the limitation, however, that such fishing locations may only be assigned or passed to members of the tribe who maintain a home

upon the reservation. Such fishing location must be fished at least once each year in a businesslike manner, failing which such locations are deemed by Tribal custom to have been abandoned.

10. Under Tribal rules, regulations and customs, fish taken from such locations may be sold only to persons licensed as Indian traders. Licenses to Indian traders are issued by the Indian Agency subject to the approval of the Tribal Council of said tribe. After purchasing fish the Indian traders are at liberty to dispose of them in any manner they deem advisable, either on or off the reservation and at such market as they may desire. [20]

11. During the year 1941 the Mohawk Packing Company of Moclips, Washington, was issued an Indian fish buyers license and during that year bought fish taken from such locations through their agent, Cleveland Jackson, who then was and now is a member of the Quinaielt tribe residing on said reservation. The Mohawk Packing Company has a plant located at Moclips, Washington, which is located near to but is not located upon said reservation. The Mohawk Packing Company is an independent organization and is managed and controlled by one Victor Borden who is not an Indian or a member of any Indian tribe.

12. During the year 1941, by oral agreement with Cleveland Jackson acting for and in behalf of said Mohawk Packing Company, the petitioners, Charles Strom and wife, sold and disposed of fish caught by them in their fishing location No. 7 to the said Mo-

hawk Packing Company. Said oral agreement was not exclusive, however, and petitioners were under no legal obligation to sell their fish to the said Mohawk Packing Company. They did actually sell their fish, during the 1941 fishing season, to the Mohawk Packing Company which fish were bought by the said Cleveland Jackson at the going market price.

13. During the taxable year 1941 petitioners realized income from fishing operations from fishing location No. 7 on the Quinault River which they were permitted to use as follows: [21]

Gross income from sales of fish to Mohawk Packing Company .....			\$5,917.29
Less: Wages paid others for assistance in connection with the spring run of salmon .....			\$1,754.52
Wages to others for assistance in handling the fall run of salmon.....			326.87
Miscellaneous expenses .....			369.20
Truck expenses .....			150.00
			2,600.59
Net income realized during the taxable year.....			\$3,316.70

In his deficiency notice respondent determined that petitioners are subject to tax on the net income derived by them from fishing operations as shown above and computed an income tax thereon in the amount of \$169.67, the details of which are fully set out in the notice of deficiency, a copy of which is attached to the petition. In addition to said deficiency respondent also asserted a 25 percent penalty thereon in the amount of \$42.42 for failure to file a return as required by law. On the basis of the facts developed and established since the

deficiency notice was issued respondent now specifically waives the amount of penalty previously asserted and makes claim only to the deficiency in tax determined in the notice of deficiency.

14. The treaty by and between the United States of America and the Quinaielt and other allied Indian tribes was entered into on July 1, 1855. A full, true and correct copy of said Treaty is hereto attached marked Joint Exhibit No. 4-D and made a part hereof. [22] No further or different treaty by and between the United States of America and said Indian tribes has ever been entered into or consummated.

15. On November 4, 1873 the President of the United States, by executive order, created the Quinaielt reserve or Indian Reservation. A full, true and correct copy of such executive order, is hereto attached and marked Joint Exhibit No. 5-E and made a part hereof. At all times since said reservation, as shown on Joint Exhibit No. 1-A, has been and now is the reservation of the Indians covered by said treaty and by such executive order.

16. Prior to the year 1941 substantially all of said reservation lands and the timber growing thereon, were allotted to various members of said tribes. There is attached hereto marked Joint Exhibit 6-F and made a part hereof a copy of the official map of the said Indian Reservation lands showing the allotment numbers thereon.

17. Neither Charles Strom nor Flora Strom have ever received certificates of competency and at all

times herein mentioned were and now are considered by the Office of Indian Affairs of the United States of America as incompetent wards of the Federal Government. By act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I p. 253 c. 233) they were and are citizens of the United States [23] of America. The said Charles Strom has been allotted on the Quinaielt Reservation allotment No. 427 described as:

Lot 1 and the Northeast Quarter of the Northwest Quarter of Section 30, Township 23 North, Range 10, W. W. M. in Grays Harbor County, Washington, consisting of 86.20 acres,

and trust patent therefor was issued to the said Charles Strom on September 29, 1926. Flora Strom is the holder of allotment No. 322 on the Quinaielt Reservation consisting of the:

West One-half of the Southeast Quarter of Section 14, Township 23 North, Range 11, W. W. M. in Grays Harbor County, Washington, consisting of 80 acres,

and trust patent to her, covering said allotment, was issued on September 29, 1926. Said allotments No. 427 and No. 322 are shown on Joint Exhibit No. 6-F hereto attached and made a part hereof.

18. The monies received by petitioners from fishing operations, during the year 1941, were not taken under control by the Indian Service of the United States of America nor by any of its officials. Said petitioners had the full and unrestricted right



and privilege of expending such funds as they saw fit without any supervision whatever by the officials of said Indian Agency or any other officials of the United States of America.

19. There are at present approximately 948 Indians who have Tribal rights in the various tribes to which the Quinaielt Indian Reservation has been allocated, residing outside of the reservation. [24] Approximately 924 Indians who have such Tribal rights reside upon said reservation, according to the records of the office of the United States Indian Service and the office of the Superintendent thereof at Hoquiam, Washington. Substantially this same number existed in the year 1941 and the proportion living on and off the reservation was approximately the same.

20. The Quinaielt Indian Reservation is largely timbered. It is not adapted to grazing or to farming. Only about  $\frac{1}{2}$  of 1 percent of the Indians engage in grazing or farming operations on said reservation. Most of the members of said tribe who reside upon the reservation live in the Indian village at Taholah. The Quinaielt and allied tribes residing on said reservation are known as "fish-eating Indians," and the principal means of livelihood of said Indians, since time immemorial, has been principally fishing and hunting. The present living members of said tribe are the descendants of the Indian tribes with whom the Treaty of July 1, 1855 was made.

21. It is further agreed and understood that



either party may offer at the hearing other or further evidence on the issue presented not inconsistent with the facts stipulated herein.

/s/ L. B. DONLEY,  
Counsel for Petitioners.

/s/ L. L. THOMPSON,  
Counsel for Petitioners.

/s/ J. P. WENCHEL, W. H. P.  
Chief Counsel  
Bureau of Internal Revenue  
Counsel for Respondent.

[Endorsed]: T. C. U. S. Filed Oct. 30, 1944.

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[Title of Tax Court and Cause]

Promulgated March 29, 1946.

Petitioners, restricted Indians residing on the Quinaielt Reservation in Washington and operating a commercial fishing business on the Quinaielt River on that reservation, where the unrestricted right of fishing by such Indians is guaranteed by treaty with the United States, are liable for tax upon income they received for their free and untrammelled use from the exercise of such right.

L. L. Thompson, Esq., and L. B. Donley, Esq., for the petitioners.

W. H. Payne, Esq., for the respondent.

Respondent determined a deficiency in income tax of \$169.67 for the calendar year 1941. The issue is whether restricted members of the Quinaielt tribe of Indians living on the Quinaielt Reservation

are subject to Federal income tax on income derived from the selling of fish caught by them in the Quinaielt River on that reservation. A 25 per cent [39] penalty originally asserted by respondent for failure to file a return is now waived. Substantially all the facts are stipulated and are so found. The facts hereinafter found in addition to those stipulated were established by oral testimony at the hearing.

### FINDINGS OF FACT

Petitioners, husband and wife, are restricted members of the Quinaielt tribe of Indians and reside at the Indian village of Taholah, Grays Harbor County, Washington, which is on the Quinaielt Indian Reservation. By Act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I, p. 253), they are citizens of the United States. They filed no income tax returns for the year 1941.

The date of the treaty between the United States and the Quinaielt and certain other Indian tribes was July 1, 1855. By this treaty the lands of these tribes running from the Cascade Mountains to the Pacific Ocean were ceded to the United States. Article 2 of such treaty provides:

Article 2. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the

tribe and of the superintendent of Indian affairs or Indian agent. And the said tribe bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

On November 4, 1873, the President of the United States, in carrying out the provision of this treaty to set apart a permanent reservation, [40] issued an executive order setting aside a permanent Indian reservation. The western boundary of the tract of land so set aside is the Pacific Ocean. At its eastern extremity and within the reservation is Quinaielt Lake. From this lake the Quinaeilt River flows through the reservation, emptying into the Pacific in the Indian village of Taholah. Twice each year there is a run of salmon from the sea up the river to spawn in the lake. These runs of fish vary with the years. In only an occasional year is there a run which justifies commercial fishing.

The Indians fish with gill nets set in the river. These are quite expensive and their deterioration is very rapid. The fishing is done at certain fixed and chartered locations on the river. Each location is 255 feet long. These are allotted periodically to

certain members of the tribe by the Tribal Council and the income from the use of such locations is that of the allottee and not the communal income of the tribe. In the year 1941 the petitioners were allotted and used location No. 7. Since the creation of the reservation, this location has at all times remained as common tribal property. The allocation of these locations to members of the tribe is solely by action of the Tribal Council and their assignment by the holder, or their passing to a member of his family upon his death, is controlled by the tribal rules, regulations and customs and the orders of the Tribal Council.

Under rules and regulations adopted by the Tribal Council, the periods, manner and method of the fishing, together with the type of fishing gear to be used, are regulated. These rules and regulations further provide that any fish caught may be sold only to an approved Indian trader. These traders are issued licenses by the Indian Agency subject to the approval of the Tribal Council.

Certain of the fishing locations on the river are much better than [41] others. On the best location, in a year of the largest run of fish, it is possible for the holder of the location to make a year's catch which will sell for as much as \$10,000 gross. The expense, however, in connection with the fishing is a substantial amount.

Prior to 1922 no attempt was made by the Federal government to tax the income derived by the Quinaielt Indians from the fishing operations on the reservation. In that year these Indians were notified to file income tax returns and several of

them did so. Later, presumably as a result of an opinion by the Attorney General, 34 Ops. Att'y Gen. 275, holding income of the Five Civilized Tribes exempt from Federal income tax, no further effort was made to collect such taxes until the year 1941 and the determination of the deficiency here involved.

During the year 1941, the Mohawk Packing Company of Moclips, Washington, held an Indian trader's license authorizing it to buy fish caught on the Quinaielt reservation and made purchases through their agent, Cleveland Jackson, who was a member of the Quinaielt tribe residing on such reservation. During the year 1941 the petitioners, by oral agreement with Cleveland Jackson, sold to the Mohawk Packing Company fish caught by them at fishing location No. 7. During that year petitioners realized income from their fishing operations at location No. 7, as follows:

Gross income from sales of fish to Mohawk Packing Company .....	\$5,917.29
Less: Wages paid others for assistance in connection with the spring run of salmon .....	\$1,754.52
Wages to others for assistance in handling the fall run of salmon....	326.87
Miscellaneous expenses .....	369.20
Truck expenses .....	150.00
	<hr/>
Net income realized during the taxable year.....	\$3,316.70

[43] Neither the petitioner, Charles Strom, nor the petitioner, Flora Strom, has ever received certificates of competency and at all times herein mentioned were, and now are, considered by the Office

of Indian Affairs of the United States of America as incompetent wards of the Federal government. The petitioner, Charles Strom, has been allotted 86.20 acres of the reservation, this being allotment No. 427. Flora Strom is the holder of allotment No. 322 on the reservation, consisting of 80 acres. The Quinaielt Indian Reservation is heavily timbered and is not adaptable to agricultural development. The Quinaielt and other tribes occupying the reservation are what are known as fish-eating Indians who, for many generations, have existed from their hunting and fishing operations. The income derived by the petitioners from their fishing operations in 1941, as hereinabove described, was not received by the Indian Office but was received by the petitioners as their property, free to use in any way they saw fit.

### OPINION.

Leech, Judge: This case presents a novel question not heretofore decided by the courts. May the Federal government tax income realized by an Indian who has not received a certificate of competency and is, accordingly, an incompetent ward of the government, when such income is derived by him from the exercise, on common unallotted tribal property, of a tribal right guaranteed by a treaty?

Petitioners contend that the imposition of a tax on income derived from fishing operations on the reservation constitutes a denial of the free and unrestricted right to fish guaranteed to them by treaty. It is urged that, although the treaty makes

no mention of taxation and there is no expressed exemption, the accepted rule is that such treaties are to be [43] liberally construed for the protection of the Indian and the maintenance of his rights thereunder as he understood them to be. It is argued that in view of the conditions under which the treaty was executed and the fact that, since time immemorial, these particular Indians were dependent upon their fishing operations for their support and maintenance, a fair and just construction of the guarantee of their fishing rights without interference is that it carried the meaning to them, in the execution of the treaty and the surrender of their lands, that on the reservation set aside they alone would be permitted to fish and to do so without burden or restriction of any character. It is argued that the understanding of the Indian in executing the treaty was that as to their fishing on the reservation the Federal government was precluded from taking from them any portion of the fish they caught or the proceeds of the sale or barter of such fish in securing for themselves those things necessary for their support and maintenance.

Respondent emphasizes that since the Quinaielt treaty provides for no immunity from taxation, such immunity may not be implied. He takes the position that the income in question thus comes clearly within the definition of section 22 (a), I. R. C., that obviously it does not fall within any one of the exclusions of subsection (b), and that it is therefore taxable under section 11, I. R. C., which



imposes the tax on such income of "every individual." He points out that petitioners, although Indian wards of the government, are citizens and enjoy the protection and rights of such citizenship, and that accordingly no injustice is done to wards by the Federal government in requiring them to bear their proportionate share as citizens of the general burden of taxation. [44]

The fishing rights guaranteed under Article 2 of the treaty, as set out in our findings, and similar rights guaranteed in the same language under treaties with other tribes, have been before the courts in several cases. In none of them, however, was the present question involved. Those cases involved attempts by the State or Federal governments to restrict, curtail or regulate fishing privileges specifically reserved to the Indians by treaty. The decisions there apply to the question here only to the extent that they establish that fishing rights guaranteed by treaty are the property of the Indians, that neither the State nor Federal government may, by statute, deny their exercise, and that in construing the treaties their provisions must be given effect in accordance with the understanding of the Indians when such treaties were made. *Tulee v. Washington*, 315 U. S. 681; *Seufert Bros. Co. v. United States*, 249 U. S. 194; *United States v. Winans*, 198 U. S. 371.

In *Mason v. Sams*, 5 Fed. (2d) 255, the treaty here pertinent was before the court in connection with the determination of the character of the rights possession by the Indians to fish on the reservation



in the Quinaielt River. The Commissioner of Indian Affairs, in the exercise of his statutory authority to make rules and regulations respecting the restricted Indians, had promulgated certain regulations specifying the times and manner in which fishing should be done and prohibiting the use of nets such as the Indians used. Such regulations further provided that the fish caught should be sold only to a buyer licensed by the government, that payments for the fish were to be made to the Indian Agent and that an amount be withheld therefrom ranging from five per cent on any amount from \$500 to \$1,000 to 25 per cent on amounts in excess of \$3,000. The money so withheld was to be remitted to [45] the Bureau of Indian Affairs to be used by it for the care of the aged and indigent members of the tribe or for other purposes incidental to the maintenance of the Indian Agency. In this case the court held that the Indians possessed the right to fish without any regulation or control by the Federal government, either over their fishing operations or the proceeds from the sale of the fish they caught.

There is no doubt, we think, that prior to the decisions by the Supreme Court in *Choteau v. Burnet*, 283 U. S. 691, and *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U. S. 418, the administrative interpretation of the revenue acts in the light of various Indian treaties was that the income derived by restricted Indian wards from tribal or allotted Indian lands was exempt from tax. 34 Ops. Att'y Gen. 275; 34 Ops. Att'y Gen.

302; 34 Ops. Att'y Gen. 439; 35 Ops. Att'y Gen. 1; 35 Ops. Att'y Gen. 107. This conclusion is supported by the fact that, with one exception, no attempt was made over a long period of years to tax the income derived by these petitioners and other Indians from fishing operations on the Quinaialet River. This one exception was that in 1922 the Indians were directed to file income tax returns although such direction was later withdrawn.

In *Choteau v. Burnet*, supra, the petitioner was a member of the Osage tribe of Indians holding a certificate of competency. He was held taxable upon his proportionate share of the tribal income from oil and gas leases made by the tribe on lands purchased for it by the United States with money belonging to the tribe and held in trust for it. The court there said:

The language of sections 210 and 211 (a) subjects the income of "every individual" to tax. Section 213 (a) includes income "from any source whatever." The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.

In reaching its conclusions in this case the court pointed to the fact that the income sought to be taxed was in the "untrammelled ownership" of the petitioner and that his power to use it was absolute. Accordingly the claim that petitioner was to

be considered restricted as to this income and therefore exempt from tax thereon was denied. In *Superintendent of Five Civilized Tribes v. Commissioner*, *supra*, the court held that income received by a Creek Indian, without limitation on its use, derived from the investment of funds arising from restricted lands, was subject to Federal income tax in the hands of the Indian notwithstanding that the Indian was a ward of the United States. The court emphasized that the taxing provisions of the several revenue acts are broad and that nothing therein indicates that Indians are to be excepted. It relied particularly on the facts that there was no agreement with the Creeks or any Act of Congress dealing with their affairs which expressed a definite intent to exclude such income from taxation.

In *A. M. Landman, Superintendent of the Five Civilized Tribes*, 42 B. T. A. 958; *affd.*, 123 Fed. (2d) 787; *cert. den.*, 315 U. S. 810, we had the question of whether the estate of a restricted full blooded Creek Indian was subject to Federal estate tax. It was contended that the understanding of the Indian was that his land should be non-taxable; that this embraced every form of taxation and that the understanding of the Indian must be given effect. [47] In that case we said:

Apparently all of these arguments were pressed upon the United States Supreme Court in the case of *Superintendent of the Five Civilized Tribes v. Commissioner* 295 U. S. 418. The Supreme Court rejected the contentions in holding that the income

of a trust fund held for a restricted Indian was subject to income tax. The Supreme Court said:

Nor can be conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. *Choate v. Trapp*, 224 U. S. 665. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

The petitioner contends that the above cited case is not in point in this proceeding for the reason that the Court was there dealing only with income derived from the investment of surplus funds of a restricted Indian and not with income derived from royalties on oil produced from the Indian's land. It is apparent, however, from the rationale of the opinion and from the cases cited, that the court intended to make no distinction between a restricted Indian's income derived from the investment of surplus funds and his other taxable income. The point was made that "The language of sections 210 and 211 (a) [Revenue Act of 1918] subjects the income of 'every individual' to tax." Therefore the income of the restricted Indian is subject to tax the same as the income of an unrestricted Indian or any other citizen or resident. \* \* \*

In affirming our decision in this case, the court said:

Likewise in *Choteau v. Burnet*, *supra*, the court refused to extend immunity from a tax sought to

be imposed by the national government upon income of a restricted Indian, although such income was derived from his share of a departmental oil and gas lease, the proceeds of which were held by the Superintendent as tribal trust funds until they were disbursed to the restricted Indian. The court held that after the funds were paid over to the unrestricted Indian, they no longer retained a restricted character and the recipient thereof was not entitled to tax immunity thereon.

In *Superintendent v. Commissioner*, *supra*, the court denied the claimed exemption from income tax (Revenue Act of 1928, Sec. 11 and 12, 26 U. S. C. A. Int. Rev. Acts, page 352) on income derived from the restricted allotment of a fullblooded Creek Indian held by the United States in trust for him under the direction of the Superintendent. The court found nothing in the treaties, agreements, and acts of [48] Congress, upon which the Superintendent now relies, which would justify exclusion [sic] from taxation the income derived from the restricted land, concluding that "the taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." The court made a clear distinction between a tax levied upon land as such, and the income derived therefrom.

The question here is different from that presented in the last three cited cases in that the income presently involved was derived personally by a restricted Indian in his exercise of a right guar-

anted to him by treaty. The principles laid down in the cited cases would appear to apply with equal force to the instant situation and deny the exemption. There is here no express exemption from tax in the treaty with the Quinaielt Indian tribe. The income which respondent seeks to tax is in the "untrammelled possession" of the petitioners with no restriction upon its use by them. We do not agree with the argument that the imposition of the tax upon income earned by these petitioners in carrying on a commercial fishing business on the Quinaielt River is a restriction upon the right to fish guaranteed by the treaty. The Quinaielt Indians on the reservation were as free to fish in the Quinaielt River after the imposition of an income tax as they were prior to that time. The disputed income tax is not a burden upon the right to fish but upon the income earned through the exercise of that right.

Likewise we do not agree with the position of petitioners that in the making of the treaty the understanding of the Indian of its terms that the government was precluded from laying any such burden upon him. It is a far cry from the fishing operations of the members of an uncivilized tribe of Indians at the time of the execution of this treaty, and the commercial fishing business now carried on by these petitioners. Of course there is nothing to indicate that when the Quinaielt treaty was executed such taxes [49] as are here involved had been even conceived. The parties to that treaty, certainly, did not contemplate the present situation.

It is undoubtedly true that the Federal government is not empowered to lay a tax upon the exercise of the right of the petitioners to fish in the waters of this reservation and the petitioners may not be restrained or regulated in the exercise of that right except by their own Tribal Council. They are, however, citizens of the United States engaged in a gainful occupation from which they derive income which is theirs to use and spend as they see fit. Therefore since there is no contractual or statutory exemption to which they can point, or we have found, exempting them from payment of the tax imposed on the income of "every individual,"

Reviewed by the Court.

Decision will be entered for the respondent. [50]

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The Tax Court of the United States  
Washington

Docket No. 1798.

CHARLES STROM AND FLORA STROM,  
Husband and Wife,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION.

Pursuant to the Findings of Fact and Opinion of the Court promulgated March 29, 1946, it is hereby



Ordered and Decided, that there is a deficiency in income tax for the year 1941 in the amount of \$169.67.

Enter:

/s/ J. RUSSELL LEECH,  
Judge.

Entered March 29, 1946. [51]

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[Title of Tax Court and Cause]

#### STIPULATION AS TO VENUE

The petitioners and the respondent, by their respective attorneys, hereby stipulate, in accordance with the provisions of Section 1141(b)(2) of the Internal Revenue Code, that the decision of the Tax Court of the United States in the above-entitled case may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ L. B. DONLEY,  
/s/ L. L. Thompson,  
Attorneys for Petitioners.

/s/ SEWALL KEY,  
Acting Assistant Attorney  
General.  
Attorney for Respondent.

Dated this 31st day of May, 1946.

[Endorsed]: T. C. U. S. Filed June 17, 1946.



In the United States Circuit Court of Appeals  
For the Ninth Circuit

U. S. Tax Court Docket No. 1798

CHARLES STROM and FLORA STROM,  
Petitioners on Review,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

PETITION FOR REVIEW AND  
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:

I.

The petitioners herein referred to as the taxpayers are husband and wife and are residents of the Village of Taholah, Grays Harbor County, in the State of Washington. The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, herein referred to as the Commissioner. An agent and representative of the respondent, upon information furnished by the taxpayers, caused to be filed for and on behalf of the taxpayers an income tax return for the year 1941 with the Collector of Internal Revenue for the Western District of Washington, whose office is located within the Federal Judicial District wherein the taxpayers also reside. The parties hereto have stipulated that the de-

cision of the Tax Court herein referred to may be reviewed by [53] the Circuit Court of Appeals for the Ninth Circuit.

## II.

The Commissioner determined a deficiency in income taxes against the taxpayers for the year 1941 in the sum of \$169.67, and in accordance with the provisions of the applicable statutes, sent to the taxpayers by registered mail a notice of said deficiency. Within ninety days thereafter the taxpayers filed a petition for review from the said notice of deficiency in the Tax Court of the United States. The case was in due course submitted to the Tax Court upon a written stipulation of facts and upon certain evidence offered by the taxpayers. On March 29, 1946, the Tax Court promulgated its findings of fact and opinion in said proceedings, and on April 1, 1946, entered a judgment and final order of redetermination wherein and whereby it ordered and decided that there was a deficiency of \$169.67 in the taxpayers' income tax for the year 1941.

## III.

The alleged deficiency in taxpayers' income taxes were in controversy before the Tax Court of the United States and arose from the following facts:

Petitioners are restricted members of the Quinault Tribe of Indians, and during the year 1941 and at all times since lived on the Quinault Indian Reservation in Grays Harbor County, Washington. This reservation was created by executive order of the President of the United States on November 4,

1873, which order was made [54] pursuant to a certain Treaty entered into between the United States and the Quinault Indian and certain other Indian Tribes on July 1, 1855. By the terms of this Treaty the Quinault Tribe, who were the ancestors of the petitioners, and the other Tribes who were signatories to this Treaty, ceded to the United States their claim to large and substantial areas of land in the western part of the State of Washington, particularly between the Olympic Range and the Pacific Ocean. Said Treaty, however, reserved for the use and occupation of the Tribes tracts of land sufficient for their wants to be selected by the President, and prohibited the residence of white persons on the reservation without the permission of the Tribe. The lands included within the boundaries of the Quinault Indian Reservation are entirely forest lands and are and never will be suitable for agriculture. There flows through said Quinault Indian Reservation a river known as the Quinault River, which river has from time immemorial been the habitat of a very fine specie of salmon known as Quinault salmon. These salmon are available for the taking only at certain times in the spring and fall of each year, and the run from year to year varies from a negligible quantity to a substantial amount. Salmon are caught by the use of set nets along the river, the location for such nets having been set aside pursuant to Tribal rules and regulations. The only means of livelihood which petitioners and the members of the Tribe had in 1941 and for many years previous, was from

the sale of timber allotted to the members of the Tribe on the reservation and from the catching and sale of Quinault salmon. Allotted timber is sold by the Commissioner of [55] Indian Affairs at a price determined by him, and the proceeds of such sale is by the United States paid at such times and in such amounts as the Commissioner of Indian Affairs, in his discretion, may determine. All of the income upon which this deficiency tax was levied arose from the catching and sale of Quinault salmon by the taxpayer, Charles Strom, in the year 1941. These salmon were sold in their natural state as they were taken from the waters of the Quinault River, by petitioners to fish buyers who are licensed to engage in that business in the discretion of the Commissioner of Indian Affairs of the United States. Delivery of the salmon was made within the boundaries of the reservation, and they were not processed or placed in a condition for sale or consumption by the taxpayers. Previous to the year 1922, the members of this Tribe filed no income tax returns from income arising out of the sale of this salmon under appropriate order and instruction of the Commissioner of Indian Affairs. In the year 1922 or 1923 the members of the Tribe were instructed to file returns and a few of them did so; but a few months thereafter they were instructed by the Commissioner of Indian Affairs that under appropriate rulings of the Department of Internal Revenue they were not required to file such income tax returns. Pursuant to rulings of the Department of Internal Revenue and of the

Attorney General of the United States no returns upon this type of income were filed or required to be filed by any of the members of this Tribe until the year 1943, when the Department of Internal Revenue then insisted that tax returns be filed for the year 1941 covering income arising from the sale of such salmon.

#### IV.

The petitioners say that in the records and proceedings before the Tax Court of the United States, and in the decision and final order of redetermination rendered and entered by the Tax Court, manifest errors occurred to the prejudice of petitioners, and they assign and assert that the following errors, and each of them, occurred in said record, proceedings, decision and final order of redetermination, and that upon these they rely to reverse the said decision and final order of redetermination so rendered and entered by the Tax Court of the United States, to-wit:

1. The erroneous determination of the Tax Court that the provisions of the general statutes of the United States, providing generally for a tax upon net income, apply to and cover the income herein involved, that is to say, income arising from the sale of fish caught and sold by the taxpayers in the Quinault Indian Reservation, under the facts and circumstances shown by the record.

2. In holding that under the provision of the Treaty of July 1, 1855, between the United States and the Quinault and other Indian Tribes, the Gov-

ernment of the United States had the right to levy an income tax upon income of this character.

3. In failing to construe said Treaty liberally and in accordance with the understanding as to its meaning originally agreed to between the representatives of the United States and of said Tribe at the time the Treaty was made. [57]

4. In holding that this Treaty did not create a vested right in the petitioners to take these fish and sell them free from taxation, which could not be taken away under the provisions of the Fifth Amendment to the Constitution of the United States the protection of which is hereby invoked by petitioners.

5. In refusing to hold that on account of relations between the Government and these Indians that the Government, by its conduct during the period from 1923 to 1943, acting through the Department of Indian Affairs and the Office of the Attorney General and the Bureau of Internal Revenue, was not precluded in equity and justice from seeking to collect this tax.

6. In refusing to hold in any event that the sale of this fish by petitioners should be regarded as a sale of a capital asset without gain, and therefore not subject to a tax.

7. In entering a deficiency judgment against the petitioners for income taxes for the year 1941 in the sum of \$169.67, or in any sum whatsoever.

Wherefore, petitioners petition that said decision

of the Tax Court of the United States be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken by said court to the end that the errors complained of may be reversed and corrected.

/s/ L. B. DONLEY.

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

State of Washington,  
County of Pierce—ss.

L. L. Thompson, being first duly sworn, on his oath says that he is one of the attorneys of record for the petitioners named in the foregoing petition for review, and as such is authorized to verify said petition; that he has read said petition, knows the contents thereof, and that the statement of facts therein is true.

/s/ L. L. THOMPSON.

Subscribed and sworn to before me this 12th day of June, 1946.

[Seal] CLARA J. COWLEY,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: T.C.U.S. Filed June 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION  
FOR REVIEW

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

Please Take Notice that the petitioners on the 17th day of June, 1946, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review and assignments of error by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the board heretofore rendered in the above entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of June, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

Personal service of the foregoing notice, together with a copy of the Petition for Review and Assignments of Error mentioned therein, is hereby acknowledged this 17th day of June, 1946.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946.



[Title of Circuit Court of Appeals and Cause.]

## STATEMENT OF THE EVIDENCE

This cause was heard before the Hon. Arthur J. Mellott, a Judge of the Tax Court of the United States at the Federal office building in the City of Seattle, Washington, on October 30, 1944, all parties being represented by their attorneys of record. At said trial the following proceedings were had:

There was filed and submitted to the Tax Court a written stipulation of facts.

Counsel for petitioners then offered in evidence petitioners' Exhibit No. 1, which was a photostatic copy of a letter dated March 22, 1854, from Isaac I. Stevens, Governor and Superintendent of Indian Affairs, to Col. W. T. Simmons.

There was then admitted in evidence petitioners' Exhibit No. 2, which was a photostatic copy of a letter from the Office of Indian Affairs dated August 30, 1854, signed by Charles E. Ellis to Isaac I. Stevens, Governor of Washington Territory.

Petitioners' Exhibit No. 3, which was a photostatic copy of a letter dated December 21, 1854, from Isaac I. Stevens to the Commissioner of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 4, which was a photostatic copy of a letter dated March 21, 1855, and signed by Governor Isaac I. Stevens was admitted.

Petitioners' Exhibit No. 5, which was a photo-

static copy of a letter dated June 18, 1855, and signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 6, which was a photostatic copy of a letter written from Fort Benton, signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 7, which was a document entitled "Report" dated December 30, 1855, addressed to the Honorable Isaac I. Stevens, Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 8, which was a photostatic copy of a letter dated May 25, 1856, signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, to Commissioner of Indian Affairs, was received in evidence.

[Printer's Note: Petitioners' Exhibits 1 to 8 are set out in full at pages 59 to 83, inclusive, of this Record.]

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### CLEVELAND JACKSON,

a witness for and on behalf of Petitioners was then sworn and testified as follows: [62]

#### Direct Examination

I live at Taholah, Washington, and am a member of the Quinault Indian Tribe. I am chairman of the Indian Tribal Council, which is the governing council of the Quinault Tribe. I am 51 years old

and have resided on the reservation practically all my life off and on. An income tax was levied in the year 1923 against some of the Indians on the Quinault reservation for 1922 income. Four or five Indians paid it that year. I do not recall exactly how many. They were informed by W. B. Sams, then the Superintendent of the Agency, that they had to file an income tax return so he helped them to fill it out. Five or six filled it out and filed it under protest. Mr. Sams made the protest and said he would see what he could do about it. The tax return was filed sometime in either April or May and then in the middle of the summer Mr. Sams came up there and held a meeting and informed them that he had corresponded with the Commissioner of Indian Affairs who had corresponded with the Internal Revenue Department and informed them that they didn't have to file any more returns and they didn't file any at that time or since that time until the year 1941 when requests came in. I was at that meeting and heard Mr. Sams discuss it and he told me personally. I was one of the persons involved in that. I filed a return so the information was personally pertinent to me. This had to do with income from fishing operations and did not cover income off the reservation. I next learned that the Government was making an effort to collect taxes from fishing operations in the [63] summer of 1943, or it might have been 1942. Between those dates no request was made to me at any time concerning any income tax from the proceeds of fishing on the Indian Reser-

vation. The run of fish running up that river varies very much from year to year, from practically nothing up to \$10,000.00 a season for a certain good location. The first good year I remember was about 1911. It wasn't until 1922 and then 1930 and 1941 and 1942 that there were other good years. 1943 and 1944 the run wasn't good enough to buy and pay for the equipment. The gear is obtained from a concern that has an Indian traders license and is licensed by the Department of the Interior and it is their practice to furnish the equipment for the fishermen. As the fish are caught they deduct 50% toward the payment of this equipment until the equipment is paid for. A fisherman to fish his location on the river must buy gear. They must buy gear before they can do any fishing at all; that is necessary. It is made out of linen twine. The web part is made out of linen twine and then there are a series of different sizes for different kinds of fish and then after you get them they have to be put on ropes. The top is lined with cork and the bottom with lead so that it will stand straight up and down in the river. The fish push their heads through the nets and are caught. Every fisherman has to buy gear in order to fish. The fishermen take what they need in the way of smoked fish, there is some home canning, some mild salt cured and then what they get over and [64] beyond that they sell. During the last two years there hasn't been enough fishing to pay for the equipment used and there is no way of knowing when there will be another good year.

## Cross Examination

I have been a member of the Quinault Tribe during all of these years that I have testified about. I filed an income tax return in 1923 for 1922 under instructions from the Superintendent of Indian Agency. We never saw a collector over there and mine was filed with the Superintendent and he filed it with the Revenue Department. I know three others for sure who filed returns for 1922. I said I had some further discussion on that situation with Superintendent Sams. He told me that he had instructions from the Indian Department, the Commissioner of Indian Affairs, that we were not subject to income taxes. They did not give any more specific information about that. I did not file any returns from that time on. Later on request was made that the members of the tribe file returns for the 1942 season. I was present when the agents were there. They came and talked to me. He came with a bunch of blanks and said they had to file returns and that he would be very glad to help them fill them out. The catch of fish from a single location may run from nothing to \$10,000.00. There are one hundred and one locations on this river that are surveyed out and some are not worth fishing. The Indians purchase gear from the Indian traders. They are not necessarily required to but they do that. The traders know [65] the kind of equipment and that kind of equipment isn't handled everywhere. There is just one wholesale house in Seattle that handles that and they don't sell retail. If they could get it they could

come to Seattle or Tacoma. They don't sell at retail and they are sold in 100-pound balls and you have to buy a 100-pound ball in order to get one, therefore it is more or less of a pool affair. The Indians as a tribe are free to buy wherever they please. As a matter of practice and convenience they buy from traders. They can get credit against future catches of fish. The traders get a benefit out of that service. If the volume is good they get a little more profit. They get little profit on the sale of gear. I worked for a trader at one time. The trader generally sells on a ten and fifteen cent margin on stuff that will retail from \$3.00 to \$5.00 per pound. Under government regulations they are allowed 20%.

### Redirect Examination

In speaking of a \$10,000.00 catch, that is gross, out which you would have to pay expenses and when you get that many fish you have to have help.

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### FRANK W. LAW

was called as a witness on behalf of the petitioners, and being sworn testified:

I reside in Taholah, Washington, and am treasurer of the Quinault Indian Tribe and have been Chief of Police. I heard Mr. Jackson's testimony relating to the assessment of income taxes in 1922. Returns were made in 1923. Mr. Sams advised the

Indians later in the summer that they didn't have to pay any more taxes on fishing. I was not present at the meeting but I was Chief of Police and was kept pretty well advised. Mr. Sams advised me that the Indians did not have to pay income taxes on the fish. I heard Mr. Jackson's testimony relative to the returns from fishing and how they run. I have nothing to add to that but I believe there are only two people up there that have made that much since I have been there. I agree with Mr. Jackson's testimony except that there was a good run in 1915.

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OSCAR McLEOD,

called as a witness for and on behalf of petitioners,  
being sworn testified as follows:

I live at Taholah, Washington, and am a member of the Quinault Indian Tribe and a member of the business committee of the Tribe and the United States Indian Police. I have resided on the reservation about 33 years; have been engaged in fishing and am familiar with the runs of fish for the years that I have been there. The run of fish varies very, very much. As to the good years in the last 33 years the first one was in 1915 and the next one in 1922, and then 1923 and 1924 were fair years but not like 1922. Then we have some again around 1930 and 1931 and then there wasn't much until 1940 when they started a little bit, and then 1941 was a big year and 1942 was smaller again.



In 1943 there wasn't much, there was a few of them who would make a day's wages for themselves if they worked hard. In 1944 there was not a thing. I never put a net in [67] the water. The Indians used the fish for food but not a great deal of it. This fish comes all at once and they can't eat very much of the catch during the run. The people process fish for winter use; they have their canners can them and then they have lots of them dried, too, and some of them can themselves and some of them salt them.

### Cross Examination

In 1944 I did not put a net in the water in the spring run. There was plenty of nets below me and not one of them was catching anything. I was watching the fellow below and his net. It costs \$10.00 to \$15.00 a day to operate one of the sites and there is no use putting them out for 50 cents a day. You have to have the lead ropes and corks and nets and then these nets rot fast and you have to be careful to see that they do not rot before the run is over. You have to get your nets ready and wait until they come. If you had your net out and you didn't know they were coming that night, you wouldn't have any net. There is lots of angles to it. When there is not many fish they hit mostly in the day and when there is a good run they run night and day. You watch them night and day. You have to run a boat out to take the fish every two or three hours when they are running and you have to get your net out Saturday night at eight



o'clock and you cannot fish until Monday morning at six o'clock on a portion of the river. You ask me to explain how the expenses can amount to as much as \$15 a day. The net will cost around \$75.00 or \$80.00, besides the rest of it [68] that you put on it, and they will last about two weeks when the fish are running. Sometimes they won't do it. There is a condition that exists in the river, and it seems like the water is stagnant. Nobody knows exactly what it is, but a net will get black and in a few days it will just fall to pieces. That is why it costs so much operate.

Q. Now, Mr. McLeod, when you testified there were no large runs in certain years, that doesn't mean that the Indians didn't catch any fish, does it?

A. That spring run, sometimes they would get a few fish, and sometimes they would get a few fish in the fall, but it would be a small run.

Q. They always fish for purposes of supplying their families, do they not?      A. Yes.

Q. And you always catch a few fish?

A. You usually catch a few, enough to eat, yes. You take it in the fall, there are generally a few.

Q. When you say there were no fish catches, you mean there were no good fish catches in commercial quantities?      A. That's right.

Q. But there are always some for private consumption?      A. There is some, yes.

## HARRY SHALE,

a witness for petitioners, being sworn testified as follows: [69]

I am a member of the Quinault Tribe; have lived on the reservation all my life. I am a member of the tribal council and have a fishing location. I have been engaged in fishing on the reservation between 45 and 47 years. I heard the testimony of Mr. Jackson and Mr. McLeod with regard to the fishing and the good years and bad years. I agree with their testimony in the matter and have nothing to add to it.

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## CHARLES STROM,

the petitioner in the case, being sworn testified as follows:

I reside at Taholah and am a member of the Quinault Tribe. I heard the testimony of Mr. Jackson and Mr. McLeod with reference to income taxes, and the fishing seasons, and so forth. I agree with what they said. I only want to add that I have been fishing since 1911 and there has only been three runs of salmon ever since I fished; there was 1915, 1922 and 1941. Those were the peak years. The rest of the time you would make nothing. You wouldn't make enough except to get some fish to eat. You would just about make enough to live.

PETITIONERS' EXHIBIT No. 1

(Copy)

Office of Supdt. Indian Affairs

Olympia W. Ter.

March 22, 1854

Col. M. T. Simmons

Sir:

You having been appointed a Special Indian Agent, for the District of Puget Sound, in this Territory, the following instructions are transmitted for your guidance.

The limits of your district comprises all that portion of the Territory lying west of the Cascade Mountains and north of the main Chehalis and Skookum Chuck Rivers.

Your pay as Special Agent will be at the rate of \$750 per annum to commence from the 9th inst. the date of your employment. You will however be recommended to the Dept. as a full agent, and in case of approval your salary will then be at the rate of \$1500 per annum. In addition to your necessary travelling expenses, you will be allowed lights, fuel and stationery for your office.

You are authorized to employ a suitable person at a salary of not exceeding five hundred dollars per annum to act as interpreter with the Indians. Whose name you will communicate to me, that he may be nominated for confirmation by the Department. You will as soon as practicable select a site for the agency at some central [71] point upon the Sound and for

this purpose are authorized and directed to take up a tract of land in your official capacity, which tract will not exceed a full section or one square mile of land. Upon this you will establish a small temporary building, and will proceed to record the claim in the office of the Surveyor General of Oregon. The southern end of Whitby's Island is suggested as probably offering a suitable location. Due care should be taken that it be accessible to the water, and at the same time fit for agricultural purposes.

You are expected to enter forthwith upon a tour through the various tribes embraced within your District, for the purpose of acquainting yourself thoroughly with their condition, instructing them as to their relations with the citizens, and preparing the way to future negotiations. For this purpose you will organize small bands, not at present united, by gathering them into tribes, having reference to their general affinities, and by procuring the selection of head chiefs and of assistant or lesser types. Over the larger existing tribes will also direct the appointment of head and sub chiefs, taking care that in every case they be persons who, in your opinion will control them to best advantage. To these respectively you will issue commissions of the forms enclosed, filling up the blanks and making a record of the persons to whom they are given. [72] This record, together with all subsequent changes should be carefully kept, and a copy transmitted to this office, with your quarterly report.

In commissioning those persons, whom you shall

determine to recognize as chiefs or petty tyees, you will explain to them that hereafter they will be held responsible in the first place for all offenses committed against citizens by Indians of their tribe. That the head chief will in such cases be called upon for delivery of offenders, and the smaller chiefs looked to for his support, but that should they be unable without assistance from the government to make arrests, such aid will be given at their request. You will likewise inform them that on failure to do their duty, they will be removed and others appointed in their place, and that in every case of resistance by a tribe to the authorities, it will be dispersed by force and not considered in any future treaties of payments for land.

You will on every occasion press upon the citizens of the Territory, the demands of justice in their treatment of the Indians, and upon the Indians the necessity of honest and friendly conduct towards the citizens. When claims are preferred by Indians for damages, or remuneration for labor, you will carefully investigate them, and if satisfied that they are correct, you will on refusal to make them good, bring suit [73] (in the name of the United States), to recover them. When on the other hand claims are made by citizens for loss or damage by the Indians, you will in like manner examine them, and as the case may warrant adjust the same, or report the facts to the superintendent for his decision. Your particular attention is directed to the suppression of the liquor traffic, and to the bringing persons engaged therein to justice. For the details on this and

other points, you are referred to the laws relating to Indian Affairs.

You will make a careful census of the various tribes and bands according to the form herewith enclosed; ascertain as near as may be the boundaries of the territory claimed by each. Examine into the location and quantity of land necessary for reservation, and collect such other information as will in your opinion assist the Superintendent or such persons as may hereafter be commissioned to treat with the Indians. In fully understanding their relations to the Government and to the citizens of the Territory, as well as the means which may best conduce to their welfare.

In undertaking your tour of inspection you will commence with those tribes whose relation to the whites are most critical, [74] as the Clallams upon the Straits of Fuca and the Indians on Bellingham Bay. After giving due attention to these and the tribes on the Sound, unless circumstances should render expedient a different course, you are recommended to visit the coast between the Quinault and Cape Flattery, for the purpose of gaining information as to the Indians of that district of country.

Your returns are to be made quarterly, commencing on the 1st of July. Estimates of the expenses of your agency for the ensuing year must accompany your report of Oct. 1st, which should be punctually made, that they may be transmitted to the Department in time for the annual requisition. A small sum of money is herewith furnished for your im-

mediate expenses which will hereafter be increased. Accurate accounts of your travelling and other disbursements must be kept and regularly rendered. I cannot too much impress upon you the necessity of economy and care in this respect.

Very respectfully,  
Your obt. Servt.

/s/ ISAAC I. STEVENS,  
Gov. Wash. Ter.  
Supdt. Indian Affairs. [75]

The National Archives, Washington, D. C. Record copies of letters sent by the Washington Superintendent of Indian Affairs.

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PLAINTIFFS' EXHIBIT No. 2

Department of the Interior,  
Office of Indians Affairs

August 30th, 1854.

Sir:

By requisition of this office of the 12th instant, the sum of \$10,000 will be placed in your hands, or remitted to you from the appropriation of \$45,000 made by the Act of Congress approved July 31st, 1854, "for expenses of negotiating treaties with and making presents of goods and provisions to Indian Tribes in the Territory of Washington."

It is the expectation of the Department that the sum appropriated, will prove sufficient to defray all

expenses incurred in and incident to making conventional arrangements designed to be permanent, with all the Tribes and fragments of Tribes within your Superintendency, by which the United States will extinguish their claim of title to all the lands within the Territory, excepting such limited districts as it may be necessary to assign them for their occupancy in future; and I have now to inform you that you have been designated by the President as the Officer of the Indian Department to conduct the negotiations and conclude the treaties of amity and acquisition that are thus provided for.

The remittance of \$10,000 above referred to, was made to enable you [76] to enter upon the discharge of the duty hereby assigned you, as soon as you arrive in Washington Territory, and the funds will be applicable for the purchase of presents, of goods and provisions, and for defraying all expenses of a preliminary and incidental nature, connected with the negotiations, etc.

In accordance with the request made in your letter of the instant, I have directed the articles of dry goods and hardware embraced in the schedules therewith furnished by you, to be processed from the contractors with this office for Indian goods, and it is expected that the two lots, one of \$8000 in value, and one of \$12,000 will be shipped from New York to San Francisco, by fast sailing clipper ship, in a few days, to be forwarded to you, as you requested, \$8000 to Columbia Barracks, care of the U. S. Quartermaster, and \$12,000 to Olympia. Schedules of the



goods, thus procured, will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him, as to the more safe, speedy, and proper way of sending them thence to their respective destinations.

In concluding articles of agreement and convention with the [77] Indian Tribes in Washington Territory, you will endeavor to unite the numerous bands and fragments of tribes into tribes, and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.

The formation of distinct relations with each of the forty or fifty separate bands of Indians in Washington Territory would be as likely to promote the best interests of the white settlers or of the Indians, as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations in a limited number of districts of country apart from the settlements of the Whites.

Unless some such arrangement can probably be effected, you will at present conclude treaties with such tribes or bands only, as are located immediately adjacent to the settlements of the Whites, and between whom and our own citizens animosities prevail, or disturbances of the peace are reasonably apprehended, and in entering upon the execution of the duties with which you are hereby charged, you will turn your attention first to such tribes and bands.

It is desirable also that the stipulations to be ful-

filled annually on the part of the United States, be few [78] in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard particularly if you are unable to effect the combination of all the Bands into six or eight Tribes, or to arrange half a dozen treaties or less, so that every one of the tribes shall be a party to one of them.

It is not deemed necessary to give you specific instructions as to the details of the treaties. I however, enclose to you herewith, copies of the treaties recently concluded by Supt. Palmer, at Table Rock and Cow Creek, Oregon Territory, with the Rogue River and Cow Creek Indians and also printed copies of treaties lately concluded at this city with the Omaha and Ottoe and Missouri Indians.

Those negotiated by Supt. Palmer are regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians, and will afford you valuable suggestions. Those with the Omahas and Ottoes and Missourias, will indicate the policy of the Government in regard to the ultimate civilization of the Indian Tribes, the graduation of annuity payments secured to them, the encouragement of [79] of schools and missions among them, the exclusion of ardent spirits from their settlements—the security to be given against the application of their annuity funds for payment of debts and claims; the terms on which roads and railroads may be con-

structed through their reservations, and the authority proper to reserve to the President, of determining the manner in which annuities of Indians shall be applied for their benefit.

I would here remark, that the amounts secured to Tribes in Nebraska will not be a criterion for you, in regard to the amount of the annual or other payments to be made to Tribes in Washington, under stipulations of the proposed Treaties, in as much as the former held lands which had become valuable by reason of their proximity to the State of Iowa, whilst the latter have claims of title based on occupancy alone, and that occupancy of a nature not fixed, and well defined as to boundaries and the lands which they claim are far removed from the portions of the country which have been long settled, and highly improved and cultivated.

I would also refer you to the late annual report of this office, and the last annual report of the [80] Secretary of the Interior, from which you will perceive that it is regarded by the Department as the best policy to avoid, as far as it can be judiciously done, the payment of Indian annuities in money, and to substitute implements of agriculture, stock, goods, and articles necessary to the comfort and civilization of the Tribes.

You will bear in mind the distance that separates you from the Capital, and the time which must elapse from the negotiation of treaties until you hear of the action of the President and Senate upon them; and you will hence caution the Indians against ex-

pecting the first payments of annuities too soon after the conclusion of negotiations.

You will at your early convenience, furnish to this office a skeleton map of Washington Territory, showing the location of the different tribes and bands, and the boundaries of the regions respectively claimed by each; and as treaties are concluded from time to time, in your reports accompanying them, furnish a description of the reservation provided for the occupation of the Indians, with such precision, that it may be marked on the map here.

With these general views, you will nevertheless exercise a sound [81] discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts; and that you will promptly report progress, in the execution of the trust now confided to you.

Very Respectfully

Your Obedt. Servt.

CHARLES E. MIX,

Acting Commissioner.

His Excellency Isaac I. Stevens, Governor of Washington Territory, present. [82]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters received in the Washington Superintendency.

## PETITIONERS' EXHIBIT No. 3

Olympia, W. Ter., Dec. 21st, 1854

Hon. G. W. Mannypenny,  
Com. of Indian Affairs.

Sir:

A general system of operations in relation to the Indian Tribes in this Territory having been determined upon, I have in this to inform you briefly concerning it.

The Commission to treat with these Tribes has been organized and I have appointed Mr. James Doty Secretary.

It is proposed to proceed at once to hold Treaties with the Tribes west of the Cascade Mountains, upon Puget Sound and the Coast. Mr. M. T. Simmons, Special Agent for this District, has already been some days among the Indians in the vicinity, gathering them together and I shall proceed next week to hold a Treaty with them; then continue down the Sound, taking the Tribes as they are collected; thence across to the Pacific Coast, and thence up the Columbia River.

It is of great importance to the Territory and the Indians themselves, that Treaties should be speedily concluded, and Reservations selected upon which to place these Indians.

It is important that the great Council to [85] be held in the Blackfoot Country should take place as early next summer as possible, and in view of this I would urge the necessity of starting the goods, pro-

visions, etc., for that Council at an early day from St. Louis—say by the 15th of April. And I am strongly of the opinion that to insure the cheap and expediting transportation of the goods to Fort Benton, a steamer should be employed, to go to that point. All examinations of the river concur in the feasibility of the plan. In addition to the information I have already given you concerning the navigability of the Missouri, and the Report of Scouts D. Nelson, Saxton and Grover, I have the honor to transmit herewith the Report of James Doty. His examination, as you will perceive by the Report, was made when the river was at a lower stage than for several years previous, yet on the worst rapids the water was two feet in depth. The Fur Company's boats, drawing 26 inches of water, had then reached within 120 miles of Fort Benton, and by lightening them to 23 inches the pilots apprehended no difficulty in reaching the Fort.

It is not supposed, by anyone, that the Department can send up keel boats except at a ruinous expense. The interests of the Fur Company's trading on the Missouri, are in a considerable degree antagonistic to those of Govt., and no doubt they will oppose the employment of a Government steamer, with a view to transporting the Indian goods in their boats at exorbitant rates, and it is believed that any connexion with these companies will [86] be prejudicial to the interests of the Department and the Indians. For a plan of the steamer required to navigate the Upper Missouri I would refer to that which I filed in your Department.

It will be necessary for the Commission to leave the Point for the Blackfoot Country, in April, to avoid high water in the mountain streams, which occur in June. It is proposed that Delegations from all the Tribes East of the Cascade Mountains should be at the Council with the Blackfeet. These Tribes, as the Yakimas, Walla Wallas and Nez Perces, are scattered over a great extent of country ; and in order to have the Chiefs in readiness to proceed at the required time, it is necessary they should be seen and conversed with this winter. I have accordingly directed the Secretary, Mr. Doty, accompanied by the Agent for the District, to go among these Indians and prepare them for the great objects in view.

In a communication of this date, I shall urge upon the Department the necessity of an efficient Military Escort at the Blackfoot Council.

I am, Sir,

Very Respectfully,

Your Most Obt. Svt.,

/s/ ISAAC I. STEVENS,

Govt. Supt. [87]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters sent by the Washington Superintendency.





PETITIONERS' EXHIBIT No. 6

Fort Benton, August 30th, 1855

Col. M. T. Simmons,  
Special Agent,  
Olympia, W. T.

Dear Sir:

In your annual report, you will include the Tribes present at the Gray's Harbor Council, and you are requested to present with great care and minuteness the plan you recommended for carrying into execution the Treaties made with the Indian Tribes. Your attention is especially called to the question of whether the Indians of your district shall be consolidated on one or two reservations. Your report will of course give a full account of your operations in the field. The conferences with Indians incident to treaties will have their place more properly in an official journal, copies of which will accompany my report transmitting the treaties.

I have been informed by Secy. Mason of your return from the Coast and of your success with the Indians in that quarter. I trust you may be equally successful with the remaining Tribes of the Gray's Harbor Council.

Very respectfully,

Your most obedient,

ISAAC I. STEVENS,

Gov. & Supt. W. T. [99]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters sent by the Washington Superintendency.

## PETITIONERS' EXHIBIT No. 7

C. Report of Agent M. T. Simmons

Olympia, W. T., Dec. 30th, 1855.

Honorable Isaac I. Stevens,  
Superintendent of Ind. Affairs Wash. Ter.

Respected Sir:

According to your instructions I left Olympia May 23rd, 1855, on the Schooner A. B. Porter with others to aid me in my service, for the purpose of visiting Tribes of Indians on Puget Sound, to distribute goods intended as presents, to ascertain their number, their condition, their approbation of their treaties, likewise to make treaties with Tribes of Indians outside.

The following being the result of my mission:

Arrived at the Island reservation of the Squaschums, soon after proceeded to number them. I found 18 old men, 53 young men, 39 old women, 59 young women, 36 girls, 45 boys. My interpreter asked them what they most desired for their annuities, they replied that they desired 325 salmon lines, salt, twine, rope, caps, shirts, powder, lead, shoes, tobacco, axes, cut saws, files, blankets, drawing knives, cloth, calico, cotton, thread, large beads, shawls, needles, pins, fish hooks, sugar, biscuit, apples, vests.

I found old blind men, 1 old palsey woman, 35 corpuluous boys, distributed the presents to the Indians, they being much pleased with the same, expressed themselves contented with their treaty.

I found assembled at the head of Cain Inlet the Skokomish Tribe. I then proceeded to number them. Found 44 old and 60 young men, 60 young women, 55 baby boys, 51 baby girls. \* \* \* [100]

\* \* \* lances. They received their presents with pleasure, gave them some good advice and departed.

25th inst. I started with the 3 gentlemen who aided me in my business on foot to reach the assembly ground of the Kwinaiatl to examine their ground and prepare to enter into treaties, reached this place on the 30th.

The Kwinaiatl River is a handsome river some 300 ft. wide, is navigable for canoes, about 30 miles to a larger lake, the finest salmon abound here.

July 1st, made a treaty with the Kwillehyute and Kwinaialt Tribes and Huh and Qui-eets band of the latter. Commissioned Hou Yak's head chief of the Quiel-by Tatu and Kal-Caps and Sah-ah-hah-white sub chiefs. Also Klernay aa hum sub chief of the Qui-ute-ls, proceedings of Treaty you will please find attached to my report.

The presents being most agreeably accepted by them, I found the men all with large knives in their hands, but all very friendly. I observed that a very few women could be seen.

On counting them, found to be 130 old and 175 young men, 20 old and 30 young women, 50 boys, 68 girls, 15 males and 10 female babies. Not any reported absent. All being in good health and appear to be quite contented.

On examining the saw mill and land, I came to the conclusion that the mill and farm claims to be very appropriate for the purposes intended. The saw mill can be purchased for the amount of \$5000.00, the 4 claims at \$1000.00 each, making in all for mill and claims nine thousand dollars. A small flour mill for the special benefit of all the Tribes on the Sound to be selected here would be very desirable, the cost of such a mill with stones, would be two thousand dollars. I would recommend the purchase of the saw mill, claims and the building of a flour mill.

The number of buildings that are required at this agency are eleven, as follows: Agent's house, store house, school house, teachers house, hospital, barn, council house, blacksmith's house and shop, farmer's house, physician's house.

The amount required to erect the above named buildings cannot possibly be less than twenty thousand dollars.

The amount required to erect the above named building expenses during the year 1856 for the Puget Sound District W. Ter. will be ten thousand dollars.

The amount of money that will be required to defray travelling and other necessary expenses, in order to distribute the annuities and arrange all matters in connection with the treaties made with the Tribes on the Sound cannot be less than six hundred dollars per month or seven thousand two hundred dollars for the year 1856.

The present peculiarly disastrous position of our

Territory has brought about very serious changes in every relation to that which existed at the \* \* \* \*

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Washington Superintendency, W-94/1856 (Enclosure).

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PETITIONER'S EXHIBIT No. 8

Office Supdt. Ind. Affairs, W. T.  
Olympia

May 25th, 1856

Hon. Geo. W. Manypenny,  
Commissioner of Indian Affairs,  
Washington, D. C.

Sir:

I herewith enclose the Treaty made with the Quinai-etl and Quil-lip-ute Tribes of Indians on the Coast between Gray's Harbor and Cape Flattery.

In Col. Simmons' annual report, transmitted as one of the papers of my annual report reference is made to the council held with these Tribes. The programme of the Treaty was prepared by me previously to my leaving for the Blackfoot Country, and the Treaty itself was signed by me after my return.

Very Respectfully,

Your most obedient,

ISAAC I. STEVENS,  
Gov. & Supdt. Ind. Affairs.

The National Archives, Washington, D. C. Records of the Office of Indian Affairs, Washington Superintendency, W-100/1856.

The foregoing is a statement of all the evidence adduced at the hearing before The Tax Court of the United States material to this proceeding, and is hereby agreed to.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of  
Internal Revenue,

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946.

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[Title of Circuit Court of Appeals and Cause.]

### PRAECIPE FOR RECORD

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to the Petition for Review heretofore filed by the petitioners in the above cause, a transcript

of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents, or certified copies thereof, to-wit:

1. The docket entries of all proceedings before The Tax Court of the United States.

2. Pleadings before The Tax Court of the United States as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

3. Agreed statement of facts, with all exhibits attached thereto but omitting therefrom Joint Exhibit 1-A. [104]

4. Statement of the evidence with all exhibits therein referred to.

5. The findings and opinion of The Tax Court of the United States.

6. The judgment and decision of The Tax Court of the United States.

7. The Petition for Review filed by the petitioners in the above cause.

8. Stipulation as to Venue.

9. The notice of filing of the Petitioner for Review filed herein, together with admission of service of such notice and the Petition for Review by counsel for respondent.

10. This praecipe with admission of service thereon.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

Personal service of the foregoing Praecipe for Record is hereby acknowledged this 17th day of June, 1946.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of  
Internal Revenue,

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946. [105]

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The Tax Court of the United States  
Washington

[Title of Cause.]

### CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 105, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.



In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of July, 1946.

[Seal] /s/ VICTOR S. MERSCH, EMT

Clerk, The Tax Court of the  
United States.

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[Endorsed]: No. 11383. United States Circuit Court of Appeals for the Ninth Circuit. Charles Strom and Flora Strom, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 13, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11383

CHARLES STROM and FLORA STROM,  
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

STATEMENT OF POINTS TO BE RELIED  
UPON AND DESIGNATION OF PARTS  
OF THE RECORD TO BE PRINTED

Comes now Charles Strom and Flora Strom, petitioners on review in the above entitled cause, and state that the points upon which they intend to rely in this court in this case are as follows:

1. That The Tax Court of the United States erred in holding that the provisions of the general statutes of the United States providing for a tax upon net income apply to and cover the income herein involved, that is to say, the income arising from the sale of fish caught and sold by the taxpayers, who are members of the Quinault Indian Tribe, within the boundaries of the Indian Reservation.

2. That The Tax Court erred in holding that, under the provisions of the treaty of July 1, 1855, between the United States and the Quinault and other Indian tribes, the government of the United States

had the right to levy an income tax upon income of this character.

3. That The Tax Court, in its opinion and decision, failed to construe said Indian treaty liberally and in accordance with the understanding originally had between the representatives of the United States and said tribe at the time the treaty was made.

4. That The Tax Court erred in holding that this treaty did not create a vested right in the petitioners on review to take and sell these fish free from income taxes under the provisions of the Fifth Amendment to the Constitution of the United States, the protection of which is hereby invoked by petitioners.

5. Previous to 1943, the Department of Indian Affairs, the office of the Attorney General of the United States and the Bureau of Internal Revenue had, in numerous rulings, held that income of this character was not subject to income taxes, and the Department of Indian Affairs had consistently advised the members of the tribe that they were not required to make returns or pay taxes on this type of income. Petitioners intend to rely upon the point that on account of the peculiar nature of the relationship between these Indians and the Government that the Government is now bound by its previous construction of the statutes and is precluded in equity and justice from seeking to collect this tax.

6. That The Tax Court erred in refusing to hold in any event that the sale of this fish by petitioners should be regarded as the sale of capital assets without gain and therefore not subject to a tax.

7. The general point will be made that for the reasons before stated, The Tax Court erred in entering a deficiency judgment against these petitioners in the sum of \$169.67, or in any sum whatsoever.

Petitioners on Review further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above, viz:

1. The docket entry of all proceedings before The Tax Court.

2. The pleadings before The Tax Court, omitting captions, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

3. The agreed statement of facts, omitting therefrom all exhibits thereto attached.

4. Statement of the evidence with all exhibits therein referred to.

5. The findings and opinion of The Tax Court.

6. The judgment and decision of The Tax Court.

7. The petition for review filed by the petitioners.

8. Stipulation as to venue.

9. Notice of the filing of petition for review with admission of service of such notice and a copy of the petition for review upon respondent.

Dated this 10th day of July, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

(Affidavit of Service attached.)

[Endorsed]: Filed July 15, 1946. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO OMISSION OF CERTAIN PORTIONS FROM THE PRINTED RECORD

It is hereby stipulated by the parties that, in printing the record in the above entitled cause, the Clerk shall omit therefrom the following documents and papers, to wit: All exhibits attached to the Agreed Statement of Facts.

It is further stipulated that the documents and papers above referred to shall be preserved by the Clerk of the Court and may be referred to by counsel or the Court if deemed necessary during the course of the argument, or otherwise during the disposition of the cause.

Dated this 23rd day of July, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

/s/ DOUGLAS W. MCGREGOR,

Assistant Attorney General,

Attorney for Respondent.

So ordered:

/s/ FRANCIS A. GARRECHT,

Senior United States Circuit  
Judge.

[Endorsed]: Filed July 23, 1946. Paul P.  
O'Brien, Clerk.